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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 386

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. MCGUINESS, LOUIS H. MEYERS, FRANK PARELLA, ROCCO PARELLA, ALFRED PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STASI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON,

Petitioners,

—against—

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Respondents.

BRIEF OF RESPONDENT NEWS SYNDICATE CO. INC.

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Petitioners,

—against—

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Respondents.

BRIEF OF RESPONDENT NEWS SYNDICATE CO. INC.

Petitioners seek a writ of certiorari under sections 1257 and 2101, U. S. Code, title 28, to review a judgment of the Supreme Court of the State of New York, County of Queens, entered upon the remittitur of the New York Court of Appeals.

The parties to this dispute may be identified as follows:

Respondent News Syndicate Co. Inc. (herein "the News") is the publisher of the newspapers "Daily News" and "Sunday News" which are printed at plants located in New York City and distributed throughout that city and elsewhere. On the record in this case it is concededly engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board (Pet., p. 54).

Respondent Newspaper and Mail Deliverers' Union (herein "the Union"), an unaffiliated labor organization, has for many years had a collective bargaining agreement with the principal newspapers of New York City, including the News, by which it is recognized as the exclusive bargaining agent for employees in the delivery departments of those newspapers.

Petitioners have from time to time worked in the delivery department of the News and other newspapers as "regular substitutes" or "extras", on those occasions when the normal work force of "regular situation-holders" had to be augmented (Pet., p. 43).

Petitioners are not members of the Union and claim to have been denied such membership. The theory of their action is that the Union has prevented them from securing employment at the News and has thereby violated a common law duty which the Union owes petitioners as their agent.

The Opinions Below.

The state courts have declined to accept jurisdiction of the dispute, holding that petitioners are required to avail themselves of their remedy before the National Labor Relations Board.

The trial Court had reached a contrary conclusion, believing itself required by the decision of the New York courts in *Clark* v. *Curtis*[1] to hold that a common law cause of action under principles of agency law co-exists with the administrative remedy provided by federal statute (Pet., p. 46). It accordingly ordered the Union to admit petitioners to membership (*id.*, p. 48).

On appeal to the Appellate Division, Second Department, the judgment against respondents was reversed, the Court observing:

> "In our opinion, the controversy involves unfair labor practices within the purview of the Labor Management Relations Act, 1947 (U. S. Code, tit. 29 § 158, subd. [a], par. [3]; subd. [b], par. [2]) and exclusive jurisdiction thereof is vested in the National Labor Relations Board. (*Cf. Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183; *California Assn.* v. *Building & Constr. Trades Council*, 178 F. 2d 175; U. S. Code, tit. 29, § 160, subd. [a].)"

Clark v. *Curtis* had been decided by the same Court three years earlier, but the Court had no difficulty in

[1] 273 App. Div. 797 (2d Dep't 1947), *aff'd without opinion* 297 N. Y. 1014 (1948).

distinguishing that case, although it did not directly overrule it.[2]

On appeal by petitioners to the New York Court of Appeals, the judgment dismissing their complaint was unanimously affirmed without opinion. However, in a companion action, *Costaro* v. *Simons*,[3] argued and decided simultaneously with this case, the Court wrote a *per curiam* opinion which is equally applicable to this case. The Court said in part:

> "We read the complaint as alleging that the controversy involves unfair labor practices within the purview of the Labor Management Relations Act of 1947 * * *. That being so, plaintiffs are under the necessity of resorting in the first instance to the National Labor Relations Board * * *."

The Court later amended its remittitur in this case to confirm that it had decided this case upon the same ground (Pet., p. 54).

In the Court of Appeals, as in this Court, petitioners urged that *Clark* v. *Curtis* established a vested common law right of action in non-union employees for breach of a union's duty as bargaining agent. It is difficult to say what the rule of that case was, for no opinion was ever written in the case. It seems idle to speculate as to its holding (*cf.* Pet., pp. 2, 13),

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[2] The Court distinguished *Clark* v. *Curtis* on four principal grounds: (1) it was decided upon a motion addressed to the pleadings and not after a trial of the issues; (2) it was commenced prior to the passage of the Taft-Hartley Act; (3) it did not involve an employer shown to be engaged in interstate commerce; (4) no question was raised in that case as to the exclusive jurisdiction of the National Labor Relations Board.

[3] 302 N. Y. 318 (1951).

as we have the word of the Court which decided it that the case was never intended to apply to an employer subject to the jurisdiction of the National Labor Relations Board (*supra*, note 2).

The Basic Issue.

The questions framed by the petition (pp. 2-3) have no more than a remote resemblance to the issue decided in the state courts.

The Court of Appeals did not decide whether the Union was faithless to these petitioners, or whether they had been divested of a pre-existing common law right of action against the Union by the Taft-Hartley Act. The issue posed to and decided by the Court of Appeals was this:

> Does a state court have jurisdiction of a common law action, independent of any statute, against a union and an employer subject to the jurisdiction of the National Labor Relations Board, arising out of a claim of discrimination in employment opportunities against non-union men?

In giving a negative answer to this question, the Court of Appeals held that if it appeared from the pleadings that the controversy involved unfair labor practices within the purview of the National Labor Relations Act, as amended, the state courts were without jurisdiction of the action, and the plaintiffs were compelled to resort in the first instance to the federal administrative processes available for the redress of their grievances.

Summary of Argument.

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I. The federal power is supreme, and the jurisdiction of its agencies exclusive, in a controversy involving claims of discrimination affecting commerce against employees not members of a union 7

A. Congress has pre-empted the field by the National Labor Relations Act 7

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C. The concurrent exercise of federal and state supervision over this field cannot be accommodated 12

II. The agency relationship between union and employee, for the breach of which petitioners are suing, was created by a federal statute. The Court of Appeals correctly held that petitioners must avail themselves of the machinery provided by that statute for redress of their grievance 13

I.

Any question of the exercise of state power over any aspect of the employer-employee relationship must be carefully scrutinized in the light of the declared Congressional purpose "to define and proscribe practices on the part of labor and management which affect commerce".[4]

Among the practices proscribed by the federal law is "discrimination [by an employer] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization". This language appeared in the original Wagner Act and was not changed by the Taft-Hartley Act, although the latter added section 8(b)(2) to the original Act, making it an unfair labor act for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)."

While there may be "troublesome problems of supremacy and accommodation between state and federal laws",[5] the conclusion is inescapable that the federal code of regulations governing labor relations will not permit of state action, whether through the executive, legislative or judicial branch, so far as claims of discrimination against non-union employees are concerned.

This case, as the state courts accurately observed (Pet., pp. 52, 54), turns upon the "basic grievance" that petitioners have been the victims of discrimination, actual or threatened, in favor of union mem-

[4] §1(b) of the Labor Management Relations Act, 1947 (sometimes referred to herein as "the Taft-Hartley Act").

[5] Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950).

bers. The obvious purpose of the action is to enlist the aid of a state equity court to suppress such discrimination. It cannot be concealed behind a camouflage of allegations, derived from the common law of agency, that a faithless agent has violated a duty owed to its principal. Such common law principles are of little or no value in settling complex problems of labor-management relations, and it would be the height of folly to permit their application where adequate remedial processes are available under federal law.

The Court of Appeals in this case has not abdicated the entire field of labor relations to the federal government under the compulsion of the Taft-Hartley Act, as petitioners suggest (p. 17). Nor is there any warrant in the decisions below for the argument that state courts will be powerless to redress common law torts arising out of labor disputes unless this decision is reversed. No one could seriously question, for example, the continued authority of state civil and criminal courts to punish assaults upon union representatives engaged in lawful organizational work. Such auxiliary matters as the protection of person and property remain with the states.[6]

This case presents an entirely different problem, one which lies outside the proper orbit of state action: the right of non-union employees to be free from discrimination in employment exerted against them solely because of their status. If the Court of Appeals had upheld the position of the trial Court that federal jurisdiction was not exclusive, but was concurrent with state jurisdiction to attack the problem by the application of principles of agency law, the result

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[6] See Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 MICH. L. REV. 593, 602 (1948).

would frustrate the effectiveness of a single national policy in this field.

Aside from the fact that the Court of Appeals was required by numerous decisions of this Court to yield to federal power (*infra*, p. 10), the practical wisdom of such a conclusion is beyond dispute. Problems of discrimination against non-union employees in interstate industries are complex enough without superimposing control by state courts and regulatory bodies, each with its own special notion of the proper solution.

Congress has invested the National Labor Relations Board with ample powers to investigate and remedy such claims of discrimination. While petitioners depreciate the Board's processes as a "limited remedy" (Pet., p. 17), the fact is that the Board has been extremely active in prosecuting unfair labor practice charges against this Union arising out of hiring practices at the New York City newspapers, including the News.[7]

Here, then, is no case of potential conflict, but of direct, actual conflict; while petitioners were pressing their claim in the state courts, the national board was directly attacking the same problem through its own processes and in the district court.

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[7] In *Matter of News Syndicate Co. Inc. and Milton Ashkenasy*, 95 N. L. R. B. No. 143 (1951), the Board found that this Union had caused discrimination in the employment of workers in respondent's delivery department. Both respondents were directed to reimburse complainants (some of whom are petitioners here) for any pay lost by reason of discrimination. Moreover, the Union was directed to desist from causing this respondent to discriminate against employees or applicants for employment, and to notify this respondent that it had no objection to the hiring of persons without regard to their membership in the union. See also *Jaffee* v. *Newspaper and Mail Deliverers' Union*, 97 F. Supp. 443 (S. D. N. Y. 1951), where an injunction was issued against the Union at the request of the Board's regional director under section 10(j) of the Act on similar facts.

The Decisions of this Court.

The trend of this Court's opinions over the past five years in cases involving actual or potential conflict in state and federal jurisdiction over labor relations makes it plain that state power is ousted from any particular area in which federal regulations have been made directly applicable.

Bethlehem Steel Co. v. *New York State Labor Relations Board*[8] was the first of this series of cases to limit the jurisdiction of the state over a branch of labor relations. It involved a representation proceeding in which the state board had certified a bargaining representative for supervisory employees at a time when the national board had a policy against such certification. Noting that federal jurisdiction had been asserted over the employer on other matters involving labor relations, this Court held that the federal power was exclusive on a certification question and that the state instrumentality was not free to act, even in advance of federal action.

Some state courts interpreted the *Bethlehem* decision as holding that "wherever the employer-employee relationship is one over which Congress has the power of regulation and with regard to which Congress has acted, state power is suspended and cannot constitutionally be exercised."[9] The Court's decision in *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board*,[10] was in accord with that view. There the Court held that the state board did not

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[8] 330 U. S. 767 (1947).

[9] See *Pittsburgh Ry. Substation Operators Case*, 357 Pa. 379, 386 (1947); see also Cox and Seidman, *supra*, n. 5, at p. 214.

[10] 336 U. S. 18 (1949).

have jurisdiction in a representation proceeding involving the designation of an appropriate bargaining unit for a small employer probably under the jurisdiction of the national board. Explaining that its decision in the *Bethlehem Steel* case was because the situation was "too fraught with potential conflict to permit intrusion of the state agency", the Court went further and denied jurisdiction to the state agency even though the national board had not acted —indeed, for all that appeared, if it had acted it would have reached the same conclusion as the state board.

In *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*,[11] the Court permitted state enforcement of a law making it an unfair labor practice to enter into a union security agreement without the approval of two-thirds of the employees affected. This was followed a year later by the *Plankinton Packing Co.* case,[12] where the state board had found the company and the union guilty of unfair labor practices under state law for discharge of an employee on demand of the union, although he was not required to be a union member. While only a *per curiam* opinion was written in the *Plankinton* case, it has been regarded as the culmination of a line of decisions which have had the effect of excluding "state regulation of any field of activity which Congress has shown its intention to regulate, unless there is an affirmative showing that the way was kept open for state regulation".[13]

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[11] 336 U. S. 301 (1949).

[12] *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953 (1950).

[13] Cox and Seidman, cited *supra*, n. 5, at p. 224.

Finally, the Court's decision at the last term in the *Amalgamated Association* case[14] is a clear holding that state regulation may no longer be brought to bear upon rights guaranteed by Congress in §7 of the Act. And one of those rights, as the Court observed, is the right to refrain from joining a labor union or from engaging in concerted activities.[15]

It is submitted that the Court of Appeals reached the only decision possible under those cases. Had the objectives of the common law action been consistent with the federal objectives as determined by the national board, the solution might have been more difficult. But the two sets of objectives were quite diverse, and the state courts were being asked to intervene in a case which the National Labor Relations Board was not only capable and willing to handle, but had already taken in hand.

Congress has proscribed discriminations in hiring intended to encourage or discourage union membership. The national board is the agency charged by Congress with responsibility for developing and implementing policies and procedures for dealing with problems of discrimination on a national basis. It is submitted that state agencies, whether executive or judicial, may not be allowed to enter this field and act concurrently with the national board.

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[14] *Amalgamated Assn. of Street, etc., Employees* v. *Wisconsin Employment Rel. Bd.*, 340 U. S. 383 (1951).

[15] *Id.* at note 12.

II.

The relationship of agent and principal between a group of employees and their bargaining representative has its source in the National Labor Relations Act. While in some cases the relationship may derive from the consent of both principal and agent, here the agency is an involuntary one, for the Union was compelled by §9(a) of the Act to assume the duties of exclusive collective bargaining representative of all employees in the unit, whether or not members of the Union.

When the relationship is thus viewed as involuntary and purely statutory in origin, the anomaly of suing in a common law action for breach of that relationship becomes obvious. The statute created the relationship and provides the sole remedy for its breach, and the familiar principle may be invoked that where a statute provides a right and a remedy the statutory remedy is exclusive.[16]

Furthermore, the maintenance of this action in the state courts in the first instance collides with the established principle that no one is entitled to judicial relief until the prescribed administrative remedy is exhausted.

In *Myers* v. *Bethlehem Shipbuilding Corp.*[17] an employer contended that since interstate or foreign commerce was not involved and since a hearing before

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[16] See, *e. g.*, *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301 (1943).

[17] 303 U. S. 41 (1938).

the National Labor Relations Board would subject the employer to irreparable damage, rights guaranteed by the Constitution would be denied unless it were held that the District Court had jurisdiction to enjoin the National Board from conducting a hearing. In rejecting this argument, the Court made the following significant comment (p. 50):

> "So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

The force of this rule is especially compelling in this case, for "Congress has worked out elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience, and has provided for the handling of unfair labor practices by an administrative agency equipped for the task."[18]

III.

Petitioners' grievances fall within an area "within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law

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[18] Parker, *C. J.* in *Amazon Cotton Mill Co.* v. *Textile Workers*, 167 F. 2d 183, 187 (C. C. A. 4th 1948).

having its source in those statutes, rather than by local law."[19]

Petitioners would have no rights here in the absence of federal statutes dealing with labor-management relations. To the extent that those statutes create those rights, the remedy for an infringement of those rights must be found within the framework of those federal statutes. Such remedy is entirely adequate, and the Court of Appeals properly held it to be exclusive in the first instance.

The decision of the Court of Appeals on the federal question presented to it is in accord with the applicable decisions of this Court. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

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[19] *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942).